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**IN THE
COURT OF APPEALS OF INDIANA**

PROGRESSIVE MAX INSURANCE
COMPANY,

Appellant-Plaintiff,

VS.

BRADLEY CAMPBELL,

Appellee-Defendant.

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No. 10A01-0610-CV-421

APPEAL FROM THE CLARK SUPERIOR COURT
The Honorable Steven M. Fleece, Judge
Cause No. 10D03-0409-CC-1304

DECEMBER 13, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARTEAU, Senior Judge

STATEMENT OF THE CASE

Plaintiff-Appellant Progressive Max Insurance Company (Progressive) appeals the trial court's dismissal of its lawsuit against Defendant-Appellee Bradley Campbell pursuant to Ind. Trial Rule 41(E).

We affirm.

ISSUE

Progressive presents two issues for our review, which we consolidate and restate as one: whether the trial court abused its discretion by dismissing Progressive's lawsuit pursuant to Ind. Trial Rule 41(E).

FACTS AND PROCEDURAL HISTORY

In October 2002, Campbell was involved in an automobile accident with Sylvester Johnson, who was insured by Progressive. In September 2004, Progressive, as subrogee of Johnson, filed a complaint against Campbell seeking monetary damages. Progressive attempted, but was never able to perfect, service on Campbell. In June 2006, counsel for Campbell entered an appearance and moved to dismiss the case pursuant to T.R. 41(E) as a result of Progressive's failure to prosecute. Following a hearing, the trial court granted Campbell's motion to dismiss. It is from this ruling that Progressive now appeals.

DISCUSSION AND DECISION

Progressive contends that the trial court abused its discretion by dismissing its lawsuit against Campbell pursuant to Trial Rule 41(E). A timeline of the relevant events will be helpful to our discussion in this case:

September 24, 2004	Complaint filed; summons by sheriff to Bradley Campbell on Tunnel Mill Road in Charlestown, Indiana
September 30, 2004	Return of service by sheriff: “doesn’t live here”
November 3, 2004	Letter to trial court from Progressive inquiring as to service
January 12, 2005	Alias summons issued to Bradley Campbell in Marion, Indiana
February 25, 2005	Letter to trial court from Progressive inquiring as to service
March 23, 2005	Motion to dismiss granted as to Bradley Campbell of Marion, Indiana who was determined to be incorrect Bradley Campbell
May 18, 2005	Alias summons issued to Bradley Campbell on Tunnel Mill Road in Charlestown, Indiana
June 2, 2005	Return of service by sheriff: “does not live here”
October 3, 2005	Letter to trial court from Progressive inquiring as to service
January 18, 2006	Alias summons issued to Bradley Campbell on Tunnel Mill Road in Charlestown, Indiana
March 31, 2006	Alias summons issued
May 12, 2006	Alias summons issued
June 2, 2006	Motion to dismiss granted as to Bradley Campbell of Marion, Indiana for reason that he is incorrect Bradley Campbell
June 5, 2006	Motion to dismiss for lack of service filed.

Appellant’s Appendix at 1-2 and 16-18; Appellee’s App. at 3-5, 7, and 9-10.

We first address Progressive's assertion that the trial court erred by failing to rely on *State v. McClaine*, 261 Ind. 60, 300 N.E.2d 342 (1973) in ruling on Campbell's motion to dismiss. Progressive claims that the trial court failed to follow the mandate of *McClaine*, which requires that a defendant file his T.R. 41(E) motion to dismiss after the rule's sixty day period has expired and before the plaintiff resumes prosecution of its case. 300 N.E.2d at 344. *McClaine* holds that a defendant's motion to dismiss pursuant to T.R. 41(E) should not be granted if the plaintiff resumes diligent prosecution of his claim, even though, at some prior time, he has been guilty of gross negligence. *Id.* In *McClaine*, the issue was not the delay of securing service of process upon the defendant. Rather, the issue was whether the plaintiff, long after the defendant had been served, resumed prosecution of its case by requesting a trial setting. In the instant case, Progressive avers that it had resumed prosecution of its case before Campbell filed his motion to dismiss, and, in support of this argument, points out that it had filed an alias summons on May 12, 2006 just prior to Campbell's filing of his motion to dismiss on June 5, 2006.

In its dismissal order, the trial court relied upon *Geiger and Peters, Inc. v. American Fletcher National Bank & Trust Co.*, 428 N.E.2d 1279 (Ind. Ct. App. 1981). *Geiger* refers to *McClaine* and its progeny and holds that the *McClaine* rule is inapplicable when a cause is filed but a summons has not yet been served because of undue delay and lack of diligence without cause. 428 N.E.2d at 1283. In such a case, a party may timely move for dismissal of the case under T.R. 41(E) after prosecution has been resumed. *Id.* In clarifying the rationale of its holding, *Geiger* explains that to hold

otherwise would be unfair to the party who has no knowledge of the pending claim. *Id.* It is this language that causes Progressive to claim the court erred in relying on *Geiger* in its dismissal of Progressive's case against Campbell.

Progressive argues that Campbell had knowledge of the claim because defense counsel had knowledge of the claim and had been monitoring the case. At the hearing on Campbell's motion to dismiss, defense counsel explained that when Progressive filed suit, it sent notice of the case to Campbell's insurer. Campbell's insurer then contacted defense counsel to monitor the case for service of process. Tr. at 4-5. However, such knowledge and monitoring by the insurance company and defense counsel neither equates to knowledge by Campbell nor service on Campbell. An insurance company is not the agent of the insured for service of process in the absence of evidence that the insurer was designated as such. *Poteet v. Bethke*, 507 N.E.2d 652, 654 (Ind. Ct. App. 1987) (court held service on defendant defective where, although plaintiff's counsel sent copy of complaint to defendant's insurer such that insurer was aware of suit, defendant was not served with summons and complaint and there existed no evidence that defendant had designated insurer as agent for service of process). Furthermore, Campbell's actual knowledge of the suit is not sufficient if he has not been formally served. *See Chesser v. Chesser*, 168 Ind. App. 560, 563, 343 N.E.2d 810, 812 (1976) (stating that mere fact that party had actual knowledge of lawsuit does not satisfy due process or give court personal jurisdiction over party); *see also Hardy v. Maldonado*, 632 N.E.2d 381 (Ind. Ct. App. 1994) (holding that service on wife of defendant, who was a

defendant herself, did not constitute sufficient service on her husband). Thus, the trial court did not err by relying upon *Geiger and Peters, Inc.* in its dismissal order.

We will reverse a T.R. 41(E) dismissal for an abuse of discretion. *Beard v. Dominguez*, 847 N.E.2d 1054, 1058 (Ind. Ct. App. 2006), *trans. denied*, 860 N.E.2d 592, *cert. denied*, 127 S.Ct. 1286, 167 L.Ed.2d 105 (2007). An abuse of discretion occurs if the trial court's decision is against the logic and effect of the facts and circumstances before the court. *Id.* Therefore, we will affirm the trial court if there is any evidence that supports its decision. *Id.*

Trial Rule 41(E) provides, in pertinent part:

[W]hen no action has been taken in a civil case for a period of sixty (60) days, the court, on motion of a party or on its own motion shall order a hearing for the purpose of dismissing such case. The court shall enter an order of dismissal at plaintiff's costs if the plaintiff shall not show sufficient cause at or before such hearing.

The two primary objectives of this rule are to ensure that plaintiffs will diligently pursue their claims and, when they do not, to provide an enforcement mechanism through which a defendant or the court can force a sluggish plaintiff to move the case along to resolution. *Olson v. Alick's Drugs, Inc.*, 863 N.E.2d 314, 319 (Ind. Ct. App. 2007), *reh'g denied, trans. denied*.

On appeal, there are several factors we balance to determine whether a trial court abused its discretion in dismissing a case for failure to prosecute. *Id.* These factors include: (1) the length of the delay; (2) the reason for the delay; (3) the degree of personal responsibility on the part of the plaintiff; (4) the degree to which the plaintiff will be charged for the acts of his attorney; (5) the amount of prejudice to the defendant

caused by the delay; (6) the presence or absence of a lengthy history of having deliberately proceeded in a dilatory fashion; (7) the existence and effectiveness of sanctions less drastic than dismissal which fulfill the purposes of the rules and the desire to avoid court congestion; (8) the desirability of deciding the case on the merits; and (9) the extent to which the plaintiff has been stirred into action by a threat of dismissal as opposed to diligence on the plaintiff's part. *Id.* at 319-20. The weight assigned to each of these factors is fact-sensitive and should be determined on a case-by-case basis. *Id.* at 320. Nevertheless, a lengthy period of inactivity, by itself, may be enough to justify dismissal under the circumstances of a particular case, especially if the plaintiff has no excuse for the delay. *Smith v. Harris*, 861 N.E.2d 384, 387 (Ind. Ct. App. 2007), *trans. denied*, 869 N.E.2d 457.

Progressive's contention that it tendered a satisfactory reason for the delay is unpersuasive. Progressive asserts that the delay in serving Campbell was occasioned by its difficulty in obtaining Campbell's current address and its difficulty in contacting the court regarding the return of service. Progressive claims that the initial address it had for Campbell was incorrect and that a search for the correct address yielded "a dizzying number of potential addresses from which Progressive has been forced to choose." Appellant's Brief at 10. In addition, Progressive explains that it was delayed because it was not able to confirm service with the court via telephone or fax. Therefore, Progressive maintains, it was forced to send letters of inquiry to the court and wait for a response.

The CCS in this case sheds light on these arguments. First, referring to the timeline of events set out above, the original summons was directed to Campbell on Tunnel Mill Road in Charlestown, Indiana. This address was incorrect. Presumably, Progressive was advised, in response to its November 3, 2004 inquiry letter, that it had an incorrect address for Campbell. Yet, Progressive attempted to serve Campbell at this same address in May 2005. We presume that Progressive was again informed of the incorrect address in response to its inquiry letter of October 2005. Nevertheless, Progressive once more attempted service at that address in January 2006.

Additionally, in the midst of these summons that contained an incorrect address, Progressive attempted to obtain service on a Bradley Campbell located in Marion, Indiana in January 2005. However, it was determined that this was not the correct Bradley Campbell, and a motion to dismiss was granted in his favor in March 2005. However, another alias summons was issued to this same Bradley Campbell in either March 2006 or May 2006, and, in June 2006, he was once again dismissed from the case for the reason that he was not the correct Bradley Campbell. Thus, Progressive attempted to serve Campbell six times: three of these attempts were directed to the incorrect Tunnel Mill Road address and two were directed to another person with the same name.

Further, the length of the delay is another factor to consider in this case. There was a 40 day interval between the filing of the complaint and summons and Progressive's first letter inquiring as to service. More than 60 days later, Progressive issued a summons to Bradley Campbell in Marion, Indiana. Although Progressive sent another letter of inquiry to the court shortly thereafter on February 25, 2005, more than 80 days passed

between the mailing of this letter and issue of the second summons to Campbell at the incorrect address in May 2005. More than 130 days later, Progressive sent a letter of inquiry to the court on October 3, 2005. More than another 100 days passed before Progressive issued the third summons to Campbell at the incorrect address in January 2006. Finally, in March and May of 2006, Progressive issued two more summonses, one of which was sent to the wrong Bradley Campbell in Marion, Indiana. All told, Progressive's attempts to serve Campbell spanned more than twenty months with several gaps of 60 days or more between action on the part of Progressive. We are mindful that under the rule, only a delay of sixty days is required. *See* T.R. 41(E). The length of this delay and the unsatisfactory reasons for the delay favor the granting of a T.R. 41(E) motion.

Finally, Progressive boldly asserts that the delay has caused no prejudice to Campbell. We disagree with this assessment. As Campbell points out, the accident on which this case is based occurred in October 2002. At the time of the filing of Campbell's motion to dismiss in June 2006, 3 years and 8 months had passed since the accident. Conceivably, witnesses' memories have faded, witnesses have moved or died, and evidence has been lost or destroyed. Therefore, while not weighing this factor as heavily as the length of delay and the reason for delay, it is still a factor to be considered in the present case.

CONCLUSION

Based upon the foregoing discussion and authorities, we conclude that the trial court did not err by relying upon *Geiger* in its dismissal order and that it was well within its discretion when it dismissed Progressive's lawsuit pursuant to T.R. 41(E).

Affirmed.

MAY, J., and BAILEY, J., concur.